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7 TIMOTHY MICHAEL RYAN,
8 Plaintiff,
9 v.
10 CITY OF OAKLAND, et al.,
11 Defendants.

Case No. [22-cv-00521-DMR](#)

**ORDER GRANTING IN PART AND
DENYING IN PART MOTION TO
DISMISS SECOND AMENDED
COMPLAINT**

Re: Dkt. No. 24

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13 Plaintiff Timothy Ryan, a journalist, alleges that members of the Oakland Police
14 Department (“OPD”) violated his constitutional rights when they deployed tear gas against him
15 and other attendees at a protest in Oakland following the murder of George Floyd. Defendants
16 City of Oakland, Captain Roland Holmgren, and Sergeant Patrick Gonzales (collectively,
17 “Defendants”) now move to dismiss several claims in Plaintiff’s Second Amended Complaint
18 (“SAC”) pursuant to Federal Rule of Civil Procedure 12(b)(6). [Docket No. 24 (“Mot.”).] Ryan
19 opposed, and Defendants replied. [Docket Nos. 27 (“Opp’n”), 28 (“Reply”).] The court held a
20 hearing on October 13, 2022. For the foregoing reasons, the motion is granted in part and denied
21 in part.

22 **I. BACKGROUND**

23 The following facts are derived from the SAC.¹ On June 1, 2020, Ryan attended a protest
24 held after George Floyd’s murder—the fourth consecutive night of demonstrations in Oakland
25 protesting police violence. SAC ¶ 9. At the time, Ryan worked as a reporter for KCBS Radio. *Id.*

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27 ¹ When reviewing a motion to dismiss for failure to state a claim, the court must “accept as true all
28 of the factual allegations contained in the complaint.” *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)
(per curiam) (citation omitted).

¶ 10. On the night of the demonstration, he was clearly identified as a working journalist: he wore a helmet with the word “PRESS,” had his KCBS press identification attached to his belt and carried a digital recorder. *Id.*

At approximately 7:40 p.m., while Ryan was located at the corner of Broadway Street and Ninth Street and standing on a raised entry way positioned above the crowd by around thirty inches, OPD officers began deploying tear gas toward protestors and journalists, including Ryan. SAC ¶¶ 17-18. OPD members were present in and behind an officer-formed skirmish line and knew that the crowd included people who were peacefully protesting as well as journalists reporting on the protests and police responses to the protests. *Id.* ¶ 17. Immediately prior to the tear gas deployment, Gonzales reported into his body worn camera that there were no children or senior citizens in the crowd. *Id.* ¶ 19.

Ryan suffered difficulty breathing, a burning sensation in his eyes, nose, and throat, and feelings of panic due to the tear gas. SAC ¶ 25. As he attempted to flee the sidewalk where he was standing, Ryan tripped and fell, causing a near total full thickness tear in his right anterior talofibular ligament, a partial tear of his right calcaneofibular ligament, and a non-displaced fracture of the fifth metatarsal bone of his right foot. *Id.* ¶ 26. He had to undergo surgery and suffered permanent and temporary disability. *Id.* ¶ 27.

On the day of the protest, Holmgren was serving as the Department’s Incident Commander and had full authority over the tactics and weapons use of all OPD officers as well as officers sent to Oakland by mutual aid partners. SAC ¶ 11. He was also responsible for examining uses of force and their justifications and writing an after-action report for OPD’s chain of command. *Id.* ¶ 13. As Incident Commander on three of the four nights of demonstrations against police violence (May 29, 2020, May 31, 2020, and June 1, 2020), Holmgren witnessed or was briefed on allegedly unlawful uses of force on at least two nights preceding June 1, 2020. *Id.*

Gonzales was serving as the supervisor of OPD’s Tactical Operations (“Tango”) Team, which was authorized and equipped to deploy tear gas and other less-lethal weapons to support crowd control operations. SAC ¶ 15. Gonzales was also the Special Operations Tactical Sergeant, and as such, conducted a portion of the training given to the Tango Team, including officers

1 present at the demonstration. *Id.* ¶ 16. The training purportedly included how to comply with
2 OPD's crowd control policy, which directs that "the discharge of a chemical agent shall not be
3 used in demonstrations or other crowd events without the approval of the Incident Commander."
4 *Id.* ¶¶ 14, 16. It allows for an exception under exigent circumstances. *Id.* ¶ 14.

5 On June 1, 2020, Holmgren preauthorized sergeants such as Gonzales to direct the use of
6 chemical agents, allowing them to do so absent exigent circumstances; Gonzales, in turn,
7 preauthorized his subordinates to use chemical agents against demonstrators. SAC ¶ 14. Ryan
8 alleges that OPD officers ultimately failed to distinguish between peaceful and lawful protestors,
9 journalists, and people engaged in violence or unlawful activity, and that no "exigent
10 circumstances" existed that warranted deployment of tear gas under OPD policy. *Id.* ¶¶ 20-21.

11 In the SAC, Ryan claims civil rights violations against Defendants under 42 U.S.C. § 1983.
12 Specifically, he alleges: (1) a First Amendment retaliation claim against Gonzales; (2) a Fourth
13 Amendment excessive force claim against Gonzales; (3) a Fourth Amendment failure to intervene
14 claim against Gonzales; (4) a Fourth Amendment claim for failure to train and failure to supervise
15 under *Monell* against City of Oakland; and (5) a claim for supervisory liability against Holmgren
16 and Gonzales. Defendants move to dismiss the first, fourth, and fifth claims only.²

17 II. LEGAL STANDARD

18 A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the claims alleged in
19 the complaint. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).
20 When reviewing a motion to dismiss for failure to state a claim, the court must "accept as true all
21 of the factual allegations contained in the complaint," *Erickson*, 551 U.S. at 94, and may dismiss a
22 claim "only where there is no cognizable legal theory" or there is an absence of "sufficient factual
23 matter to state a facially plausible claim to relief." *Shroyer v. New Cingular Wireless Servs., Inc.*,
24 622 F.3d 1035, 1041 (9th Cir. 2010) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 677-78 (2009);
25 *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001)) (quotation marks omitted). A claim has
26 facial plausibility when a plaintiff "pleads factual content that allows the court to draw the

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28 ² Defendants do not challenge the SAC's second and third claims for relief. *See Mot.* at 3 n.1.

1 reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, 556 U.S. at
2 678 (citation omitted). In other words, the facts alleged must demonstrate “more than labels and
3 conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Bell Atl.
4 Corp. v. Twombly*, 550 U.S. 554, 555 (2007).

5 Under Federal Rule of Civil Procedure 15(a), leave to amend should be granted as a matter
6 of course, at least until the defendant files a responsive pleading. Fed. R. Civ. P. 15(a)(1). After
7 that point, Rule 15(a) provides generally that leave to amend the pleadings before trial should be
8 given “freely...when justice so requires.” Fed. R. Civ. P. 15(a)(2). “This policy is to be applied
9 with extreme liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir.
10 2003) (quotation omitted). However, leave to amend may be denied “where the amendment
11 would be futile.” *Gardner v. Martino*, 563 F.3d 981, 990 (9th Cir. 2009).

12 III. DISCUSSION

13 A. First Amendment Claim

14 “A plaintiff may bring a Section 1983 claim alleging that public officials, acting in their
15 official capacity, took action with the intent to retaliate against, obstruct, or chill the plaintiff’s
16 First Amendment rights.” *Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 867 (9th
17 Cir. 2016). A First Amendment retaliation claim requires that the plaintiff allege “(1) it engaged
18 in constitutionally protected activity; (2) the defendant’s actions would chill a person of ordinary
19 firmness from continuing to engage in the protected activity; and (3) the protected activity was a
20 substantial motivating factor in the defendant’s conduct—i.e., that there was a nexus between the
21 defendant’s actions and an intent to chill speech.” *Id.* To prevail, “a plaintiff must establish a
22 ‘causal connection’ between the government defendant’s ‘retaliatory animus’ and the plaintiff’s
23 ‘subsequent injury.’” *Capp v. Cty. of San Diego*, 940 F.3d 1046, 1053 (9th Cir. 2019) (quoting
24 *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019)). “Specifically, a plaintiff must show that the
25 defendant’s retaliatory animus was ‘a but-for cause, meaning that the adverse action against the
26 plaintiff would not have been taken absent the retaliatory motive.’” *Id.* (quoting *Nieves*, 139 S. Ct.
27 at 1722). “This element of a First Amendment retaliation claim may be met with either direct or
28 circumstantial evidence.” *Index Newspapers LLC v. U.S. Marshals Serv.*, 977 F.3d 817, 827 (9th

1 Cir. 2020); *see also Mendocino Env’t Ctr. v. Mendocino Cty.*, 192 F.3d 1283, 1300–01 (9th Cir.
2 1999). At the pleading stage, however, the plaintiff need only “allege[] plausible circumstances
3 connecting the defendant’s retaliatory intent to the suppressive conduct.” *Ariz. Students’ Ass’n*,
4 824 F.3d at 870.

5 The parties dispute the sufficiency of Ryan’s allegations as to the third element of his
6 claim—the causal nexus between Ryan’s status as a journalist and Gonzales’ conduct.³ Reply 2;
7 Opp’n 4. According to Defendants, where officers’ actions did not distinguish between peaceful
8 protestors and journalists covering the protests, “it cannot be inferred that Plaintiff’s presence –
9 even if it was known to Gonzales – was any sort of motivating factor for the use of tear gas[.]”
10 Mot. 5. Plaintiff responds it is not necessary to demonstrate that Gonzales meant harm to Ryan
11 specifically; it is sufficient to plead that he “harbor[ed] general retaliatory intent towards the
12 demonstration.” Opp’n 5.

13 None of the cases cited by Defendants preclude a plausible inference of retaliation where a
14 chemical agent is deployed against both a journalist and peacefully protesting attendees.
15 Defendants’ reliance on *Index Newspapers v. U.S. Marshals Serv.* is not persuasive. There, the
16 Ninth Circuit held that the district court had provided “exceptionally strong evidentiary support”
17 for its finding that defendants were motivated to target journalists and demonstrators in retaliation
18 for exercising their First Amendment rights. *Index Newspapers*, 977 F.3d at 827-29. That the
19 inference of retaliation was particularly strong because “plaintiffs were standing nowhere near
20 protesters” or because plaintiffs were pepper sprayed “at point blank range[,]” “shot in the chest,”
21 “shot at[,]” or “shoved away[,]” does not mean that a plaintiff cannot be targeted under a different
22 set of facts. *See id.* at 829.

23 Similarly, Defendants’ reliance on *Index Newspapers LLC v. City of Portland* is
24 inapposite. There, the court reviewed testimony and videos in connection with a motion for
25 preliminary injunction to determine whether pepper spray used during protests supported a finding

27 ³ Multiple circuits have “recognized the public’s First Amendment right to observe and film police
28 activities in public.” *Index Newspapers*, 977 F.3d at 827 & n. 4 (citing cases and finding no “good
faith basis” to challenge that journalists-plaintiffs were engaged in a constitutionally protective
activity).

1 that journalists or legal observers were targeted rather than inadvertently hit. *Index Newspapers*
2 *LLC v. City of Portland*, 480 F. Supp. 3d 1120, 1144 (D. Or. 2020). At the pleading stage, Ryan
3 need only “allege[] plausible circumstances connecting the defendant’s retaliatory intent to the
4 suppressive conduct.” *Ariz. Students’ Ass’n*, 824 F.3d at 870.⁴

5 Here, the SAC alleges that Gonzales scanned the crowd, saw Ryan—“perched thirty inches
6 above the crowd”—identified him as press based on his gear and attire, confirmed that specific
7 groups of individuals—“children and senior citizens”—were not present in the crowd, and
8 nevertheless directed subordinates to deploy tear gas toward protestors and journalists, including
9 Ryan. SAC ¶¶ 10, 17, 18, 19. These allegations are akin to those in *Johnson*, where plaintiffs
10 stated they were “peacefully participating in the demonstration either as protesters or journalists
11 documenting the march, [when] Berkeley police officers repeatedly struck them with batons, and
12 in some instances, deployed tear gas.” *Johnson v. City of Berkeley*, No. 15-CV-05343-JSC, 2016
13 WL 928723, at *1 (N.D. Cal. Mar. 11, 2016). There, the court held that plaintiffs had alleged
14 sufficient facts to infer that “had [they] not been participating in the demonstration—either as
15 protesters or journalists—[plaintiffs] would not have been subject to the use of force or arrested.”
16 *Id.*, at *5. Defendants suggest that the court’s reasoning in *Johnson* was solely premised on
17 allegations of direct uses of force against journalists. *See Reply 3*. This overstates the holding.
18 Although journalists in *Johnson* alleged that police officers used excessive force against each of
19 them specifically, the court did not foreclose the possibility of inferring retaliation where force is
20 deployed against both the plaintiff and others.

21 Plaintiff’s allegations are sufficient to support an inference that he was targeted for his
22 status as a journalist when Gonzales directed officers to deploy tear gas towards a crowd that he
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24 _____
25 ⁴ The remaining cases Defendants rely on do not grapple with the relevant facts: deployment of a
26 chemical agent against both the plaintiff and demonstrators. For example, some of the cases cited
27 by Defendants do not involve a protest. *See, e.g., Green v. Bd. of Regents of the Univ. of*
California, No. 221CV04077RGKAFM, 2021 WL 6751903 (C.D. Cal. Oct. 22, 2021) (analyzing
arrest of journalist-plaintiff while filming outside a university hospital during the COVID-19
pandemic). Other cases pertain to an arrest rather than the use of chemical agents. *See, e.g.,*
Eberhard v. California Highway Patrol, No. 3:14-CV-01910-JD, 2015 WL 6871750 (N.D. Cal.
Nov. 9, 2015); *Morse v. San Francisco Bay Area Rapid Transit Dist. (BART)*, No. 12-CV-5289
JSC, 2014 WL 572352 (N.D. Cal. Feb. 11, 2014). These cases do not shed light on the issue.

1 knew included both journalists and demonstrators. *See SAC ¶¶ 17-18; cf. Keyser v. Sacramento*
2 *City Unified Sch. Dist.*, 265 F.3d 741, 750-51 (9th Cir. 2001) (affirming summary judgment where
3 there was no evidence to support the fact that defendant had any knowledge of plaintiff's protected
4 activity). Accordingly, Defendants' motion to dismiss is denied as to Ryan's First Amendment
5 claim.

6 **B. Fourth Amendment *Monell* Claim**

7 A municipality may face section 1983 liability if it “‘subjects’ a person to a deprivation of
8 rights or ‘causes’ a person ‘to be subjected’ to such deprivation.” *Connick v. Thompson*, 563 U.S.
9 51, 60 (2011) (quoting *Monell v. Dep’t of Soc. Servs. of City of New York*, 436 U.S. 658, 692
10 (1978)). However, the municipality may be held liable “only for ‘[its] own illegal acts.’” *Id.*
11 (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 479 (1986)) (emphasis in original). It cannot be
12 held vicariously liable for its employees’ actions. *Id.* (citations omitted). To establish municipal
13 liability, plaintiffs “must prove that ‘action pursuant to official municipal policy’ caused their
14 injury.” *Id.* (quoting *Monell*, 436 U.S. at 691). “The ‘official policy’ requirement was intended to
15 distinguish acts of the *municipality* from acts of *employees* of the municipality, and thereby make
16 clear that municipal liability is limited to action for which the municipality is actually
17 responsible.” *Pembaur*, 475 U.S. at 479-80 (emphasis in original). Official municipal policy
18 includes “the decisions of a government’s lawmakers, the acts of its policymaking officials, and
19 practices so persistent and widespread as to practically have the force of law.” *Connick*, 563 U.S.
20 at 61 (citations omitted). Such policy or practice must be a “moving force behind a violation of
21 constitutional rights.” *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011) (citing
22 *Monell*, 436 U.S. at 694). An official municipal policy may be either formal or informal. *City of*
23 *Saint Louis v. Praprotnik*, 485 U.S. 112, 131 (1988) (acknowledging that a plaintiff could show
24 that “a municipality’s actual policies were different from the ones that had been announced.”).

25 In the Ninth Circuit, a municipality may be liable under section 1983 under three possible
26 theories. *Rodriguez v. Cnty. of Los Angeles*, 891 F.3d 776, 802 (9th Cir. 2018). The first is where
27 “execution of a government’s policy or custom, whether made by its lawmakers or by those whose
28 edicts or acts may fairly be said to represent official policy, inflict[ed] the injury.” *Id.* (quoting

1 *Monell*, 436 U.S. at 694).

2 Second, “a local government can fail to train employees in a manner that amounts to
 3 ‘deliberate indifference’ to a constitutional right, such that ‘the need for more or different training
 4 is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that
 5 the policymakers of the city can reasonably be said to have been deliberately indifferent to the
 6 need.’” *Rodriguez*, 891 F.3d at 802 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)).

7 Finally, a municipality may be liable under section 1983 if “the individual who committed
 8 the constitutional tort was an official with final policy-making authority or such an official ratified
 9 a subordinate’s unconstitutional decision or action and the basis for it.” *Rodriguez*, 891 F.3d at
 10 802-03 (quoting *Gravelet-Blondin v. Shelton*, 728 F.3d 1086, 1097 (9th Cir. 2013) (internal
 11 quotation marks and citation omitted)).

12 Ryan alleges municipal liability under a failure to train and supervise theory. SAC ¶¶ 38-
 13 41.⁵ Defendants move to dismiss the claim against City of Oakland.

14 Under limited circumstances, “a local government’s decision not to train certain employees
 15 about their legal duty to avoid violating citizens’ rights may rise to the level of an official
 16 government policy for purposes of § 1983.” *Connick*, 563 U.S. at 61. However, “[a]
 17 municipality’s culpability for a deprivation of rights is at its most tenuous where a claim turns on a
 18 failure to train.” *Id.* In order to establish liability under this theory, the “municipality’s failure to
 19 train its employees in a relevant respect must amount to ‘deliberate indifference to the rights of
 20 persons with whom the [untrained employees] come into contact.’” *Id.* (citing *Canton v. Harris*,
 21 489 U.S. 378, 388 (1989)). This “stringent standard of fault” requires proof that “policymakers
 22 are on actual or constructive notice that a particular omission in their training program causes city
 23 employees to violate citizens’ constitutional rights.” *Connick*, 563 U.S. at 61; *see also Canton*,
 24 489 U.S. at 389 (“[o]nly where a failure to train reflects a ‘deliberate’ or ‘conscious’ choice by a
 25 municipality—a ‘policy’ as defined by our prior cases—can a city be liable for such a failure
 26 under § 1983.”). Similarly, “[a] failure to supervise that is ‘sufficiently inadequate’ may amount

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 28 ⁵ At the hearing, Plaintiff confirmed that the SAC alleges a *Monell* claim based solely on City of
 Oakland’s alleged failure to train and supervise. The court limits its analysis accordingly.

1 to ‘deliberate indifference.’” *Dougherty v. City of Covina*, 654 F.3d 892, 900 (9th Cir. 2011)
 2 (quoting *Davis v. City of Ellensburg*, 869 F.2d 1230, 1235 (9th Cir.1989)). Mere negligence in
 3 training or supervision, however, does not give rise to a *Monell* claim. *Id.*

4 In *City of Canton*, the court addressed the circumstances under which a municipality can
 5 be held liable under section 1983 based on inadequate training, describing the inquiry as follows:

6 In resolving the issue of a city’s liability, the focus must be on
 7 adequacy of the training program in relation to the tasks the particular
 8 officers must perform. That a particular officer may be
 9 unsatisfactorily trained will not alone suffice to fasten liability on the
 10 city, for the officer’s shortcomings may have resulted from factors
 11 other than a faulty training program. [citations omitted]. It may be,
 12 for example, that an otherwise sound program has occasionally been
 13 negligently administered. Neither will it suffice to prove that an
 14 injury or accident could have been avoided if an officer had had better
 or more training, sufficient to equip him to avoid the particular injury-
 causing conduct. Such a claim could be made about almost any
 encounter resulting in injury, yet not condemn the adequacy of the
 program to enable officers to respond properly to the usual and
 recurring situations with which they must deal. And plainly,
 adequately trained officers occasionally make mistakes; the fact that
 they do says little about the training program or the legal basis for
 holding the city liable.

15 *Arteaga v. City of Oakley*, No. 19-CV-05725-JCS, 2020 WL 511876, at *7 (N.D. Cal. Jan. 31,
 16 2020) (quoting *Canton v. Harris*, 489 U.S. at 390-91).

17 Here, Ryan alleges that City of Oakland failed to adequately train and supervise OPD
 18 officers to refrain from using tear gas and excessive force and was deliberately indifferent to the
 19 consequences of those actions. SAC ¶¶ 38-41. These allegations are conclusory and lack factual
 20 support. Although the SAC alleges that Gonzales conducted a training for Tango Team members
 (SAC ¶ 16), it contains no allegations about how this training was deficient.⁶ To the contrary, the
 21 SAC states that Gonzales’ training “purportedly” taught officers how to comply with OPD’s
 22 crowd control policy. SAC ¶ 16. In the same vein, Plaintiff alleges that Holmgren acted “in
 23 dereliction of his duty as Incident Commander” and Gonzales acted “in violation of the policy”
 24 when they preauthorized subordinates to use chemical agents on June 1, 2020. *Id.* ¶ 14. These
 25 allegations suggest that the deployment of tear gas was not the result of a failure to train by City of
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28 ⁶ Plaintiff argues that “officers were not trained to refrain from using excessive force to suppress speech” but does not allege any facts to support this claim. See Opp’n 7.

1 Oakland, but the Defendants' failure to follow instructions. *See J.K.J. v. City of San Diego*, 42
2 F.4th 990, 999 (9th Cir. 2021) ("The[] allegations suggest that the moving force behind the alleged
3 constitutional violation was not a failure to train, but the officers' failure to heed their training.").

4 Ryan's failure to supervise claim is also conclusory. Plaintiff argues that City of Oakland
5 was aware that its officers were using unlawful force to suppress speech because OPD's chain of
6 command received after action reports that examined uses of force on each night of the
7 demonstrations. Opp'n 7; *see SAC ¶ 13*. He further contends that instead of correcting this
8 behavior, Holmgren and Gonzales "gave more authority to officers to use force without supervisor
9 approval." Opp'n 7. A municipality may be held liable "only for '[its] own illegal acts.'" *Connick*, 563 U.S. at 60 (emphasis in original) (citation omitted). The SAC does not allege that
10 Holmgren or Gonzales were City of Oakland's "lawmakers" or "policymaking officials," nor do
11 their titles support such an inference. *See id.* at 61. Without more, these allegations do not
12 adequately distinguish acts of City of Oakland from acts of its employees, and therefore cannot
13 establish municipal liability. *See Pembaur*, 475 U.S. at 479-80.

14 Accordingly, the SAC fails to state a *Monell* claim based on a failure to train or supervise.
15 The claim against City of Oakland is dismissed.

17 C. Supervisory Liability Claim

18 Supervisory officials may be liable under section 1983 for violations of a plaintiff's
19 constitutional rights but they "may not be held liable under Section 1983 for the unconstitutional
20 actions of their subordinates based solely on a theory of respondeat superior." *Moss v. U.S. Secret*
21 *Serv.*, 711 F.3d 941, 967 (9th Cir. 2013), *rev'd sub nom. on other grounds*, *Wood v. Moss*, 134 S.
22 Ct. 2056 (2014) (citation omitted). A defendant may be held liable as a supervisor under section
23 1983 "if there exists either (1) his or her personal involvement in the constitutional deprivation, or
24 (2) a sufficient causal connection between the supervisor's wrongful conduct and the
25 constitutional violation." *Starr v. Baca*, 652 F.3d 1202, 1207 (9th Cir. 2011) (citing *Hansen v.*
26 *Black*, 885 F.2d 642, 646 (9th Cir. 1989)). The supervisor defendant need not be "directly and
27 personally involved in the same way as are the individual officers who are on the scene inflicting
28 constitutional injury." *Id.* at 1205. If a supervisory official is not directly involved in the

1 allegedly unconstitutional conduct, then “[a] supervisor can be liable in his individual capacity for
 2 his own culpable action or inaction in the training, supervision, or control of his subordinates; for
 3 his acquiescence in the constitutional deprivation; or for conduct that showed a reckless or callous
 4 indifference to the rights of others.” *Id.* at 1208 (quoting *Watkins v. City of Oakland*, 145 F.3d
 5 1087, 1093 (9th Cir. 1998)). Liability can be established if the supervisor “knowingly refused to
 6 terminate a series of acts by others, which he knew or reasonably should have known would cause
 7 others to inflict a constitutional injury.” *Dubner v. City & Cty. of San Francisco*, 266 F.3d 959,
 8 968 (9th Cir. 2001).

9 Ryan alleges that Holmgren and Gonzales “personally participated in the series of events
 10 that resulted in plaintiff RYAN’s constitutional, physical, and emotional injuries” and “failed in
 11 their obligation to adequately train and supervise officers to refrain from using tear gas and
 12 excessive force[.]” SAC ¶ 43. At the hearing, Plaintiff conceded that the claim against Holmgren
 13 is based solely on an alleged failure to supervise. Defendants move to dismiss both supervisory
 14 liability claims.

15 **1. Holmgren**

16 Defendants argue it is not enough for Holmgren to have preauthorized agents to direct the
 17 use of chemical agents because “personal involvement” in the violation must be direct—not
 18 simply based on a defendant’s organizational role. Mot. 7. Plaintiff responds that the supervisory
 19 liability claim against Holmgren is adequately pleaded because the SAC makes numerous
 20 allegations about Holmgren’s actions and inactions. Opp’n 8.

21 Defendants rely on *Moss* and *Felarca* to argue that the allegations regarding Holmgren’s
 22 personal involvement do not suffice to state a claim. Opp’n 7-8.⁷ However, in *Moss*, plaintiffs
 23 made “no allegation that the supervisors took any specific action resulting in the use of excessive
 24 force by police officers on the scene of the … demonstration.” 711 F.3d at 968. Likewise, in
 25

26 ⁷ Defendants also cite *Flores* and *Hyde* to argue that Plaintiff is required to plead “deliberate
 27 indifference.” Mot. 8. Both cases involve failure to train claims. See *Flores v. Cnty. of Los*
Angeles, 758 F.3d 1154, 1158-59 (9th Cir. 2014); *Hyde v. City of Willcox*, 23 F.4th 863, 874-75
 28 (9th Cir. 2022). As Plaintiff’s supervisory liability claim against Holmgren is limited to an alleged
 failure to supervise, the court does not rely on these cases to reach its decision.

1 *Felarca*, the allegations against defendants were sparse. There, the court found no supervisory
 2 liability where plaintiffs failed to allege that defendants had supervisory authority over the police
 3 who committed the alleged violations or connect defendants' actions to the force applied by each
 4 police officer. *See Felarca v. Birgeneau*, 891 F.3d 809, 820-21 (9th Cir. 2018).⁸

5 In contrast, Ryan specifically alleges that Holmgren was serving as OPD's Incident
 6 Commander when he preauthorized sergeants to use chemical agents against demonstrators—
 7 allowing them to do so absent exigent circumstances. SAC ¶ 14. The SAC further states that, as a
 8 result, Gonzales preauthorized his subordinate officers to do the same. *Id.* These allegations
 9 sufficiently establish a causal connection between Holmgren's wrongful conduct—preauthorizing
 10 officers to direct the use of chemical agents in violation of OPD policy—and the constitutional
 11 violation—deployment of tear gas on the same day without the existence of exigent circumstances.
 12 *See Starr*, 652 F.3d at 1207-08 (“The requisite causal connection can be established ... by setting
 13 in motion a series of acts by others[.]”) (citation omitted).

14 Accordingly, Plaintiff's factual allegations are sufficient at the pleading stage to support a
 15 cognizable supervisory liability claim against Holmgren based on a failure to supervise theory.

16 2. Gonzales

17 a. Failure to train

18 Defendants argue that the supervisory liability claim against Gonzales should be dismissed
 19 because it is duplicative of other claims in the SAC and fails to allege a duty to train, any defect in
 20 training, or a causal connection between the alleged defect and the violation of Plaintiff's
 21 constitutional rights. Mot. 8. Plaintiff asks the court to infer that Gonzales' training and
 22 supervision were deficient because his subordinates used excessive force against demonstrators on
 23 June 1, 2020. *See Opp'n 11.*

24 Although Plaintiff alleges that Gonzales had a duty to train officers and in fact trained
 25 officers present at the June 1, 2020 demonstration (SAC ¶ 16), his claim fails to allege how

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 27 ⁸ Where some plaintiffs in *Felarca* alleged direct uses of force by officers under defendants'
 28 command, the court did not decide whether plaintiffs' supervisory liability claim was sufficiently
 pled; instead, the court granted summary judgment on qualified immunity grounds. *Felarca*, 891
 F.3d at 821-23.

1 Gonzales' training was deficient. *See Moss*, 711 F.3d at 968 (finding plaintiffs' allegations
2 conclusory where they alleged no facts about the officers' training or specified in what way the
3 training was deficient). Instead, Plaintiff alleges that Gonzales' training "purportedly" included
4 how to comply with OPD's crowd control policy, which itself prescribes when and how force may
5 be used during a demonstration. SAC ¶ 16. Where a training is alleged to cover compliance with
6 a policy, and that policy is not itself alleged to be deficient, the SAC cannot support a reasonable
7 inference that the training must have been deficient simply because officers who attended
8 Gonzales' training unlawfully deployed tear gas. *See Johnson*, 2016 WL 928723, at *4
9 ("[A]llegations of inadequate or improper training on their own are insufficient unless
10 accompanied by facts about the officers' training or supervision and specifics regarding why any
11 such training was deficient.") (internal quotation marks and alterations omitted).

12 **b. Failure to supervise**

13 Defendants argue that Ryan's failure to supervise claim against Gonzales is both
14 "duplicative" and "undescribed[.]" Mot. 8. Plaintiff responds that the SAC sufficiently alleges
15 that Gonzales was present and directly supervising officers on June 1, 2020, and even if the claim
16 is duplicative, it should not be dismissed because plaintiffs may identify multiple legal theories.
17 Opp'n 10.

18 The SAC alleges that Gonzales had supervisory authority over the officers who deployed
19 chemical agents on June 1, 2020, and that Gonzales in fact pre-authorized his officers to use
20 chemical agents that day. SAC ¶¶ 14-15. As with Holmgren, these allegations establish a
21 sufficient causal connection between Gonzales' actions and the deployment of tear gas by OPD
22 officers supervised by Gonzales. *See Starr*, 652 F.3d at 1207-08.

23 To the extent Ryan's supervisory liability claim against Gonzales is duplicative of other
24 claims in the SAC, the federal rules allow plaintiffs to rely on alternative allegations and theories
25 of liability. *See Fed. R. Civ. P. 8(d)(2)* ("A party may set out two or more statements of a claim or
26 defense alternatively or hypothetically, either in a single count or defense or in separate ones.");
27 *see also Astiana v. Hain Celestial Grp., Inc.*, 783 F.3d 753, 762 (9th Cir. 2015) (instructing that a
28 claim for unjust enrichment should not be dismissed as duplicative or superfluous of other claims

1 because a party may set out alternative claims) (citation omitted).

2 Plaintiff's factual allegations are sufficient to support a cognizable supervisory liability
3 claim against Gonzales based on a failure to supervise theory.

4 **IV. CONCLUSION**

5 For the foregoing reasons, Defendants' motion to dismiss is granted as to the *Monell* claim
6 against City of Oakland. The motion to dismiss is otherwise denied. Ryan does not request leave
7 to amend, and the court finds that further amendment at this stage would be futile. Accordingly,
8 the *Monell* claim is dismissed with prejudice.

9
10 **IT IS SO ORDERED.**

11 Dated: November 4, 2022

12 
13 Donna M. Ryu
14 United States Magistrate Judge